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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRENT MELBON,

Plaintiff and Respondent,

v.

ARTIANO SHINOFF ABED
BLUMENFELD CARELLI KOSTIC
SLEETH & WADE APC et al.,

Defendants and Appellants.

G055550

(Super. Ct. No. 30-2016-00875744)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Martha K. Gooding, Judge. Affirmed.

Artiano Shinoff Abed Blumenfeld Carelli Kostic Sleeth & Wade, Paul V. Carelli, IV and Jack M. Sleeth Jr., for Defendants and Appellants.

Wilcox, Dunakin & Chrisopoulos, Christopher S. Dunakin, Lance D. Orloff for Plaintiff and Respondent.

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Defendants Artiano Shinoff Abed Blumenfeld Carelli Kostic Sleeth & Wade APC, Daniel R. Shinoff, and Jeanne Blumenfold (Attorney Defendants) appeal from the court's order denying their special motion to strike (anti-SLAPP motion) under Code of Civil Procedure section 425.16. The court found plaintiff Brent Melbon's malicious prosecution action against Attorney Defendants arose out of protected activity and plaintiff demonstrated a probability of prevailing on his claim. Attorney Defendants contend that plaintiff cannot demonstrate a probability of prevailing because plaintiff released all claims against them in a prior settlement. They also claim that, regardless of the release, plaintiff cannot establish a probability of prevailing on his claim. We conclude the court correctly ruled the release was ineffective as to the Attorney Defendants and that plaintiff has otherwise demonstrated the requisite minimal merit of his claim, sufficient to withstand the anti-SLAPP motion. Accordingly, we affirm the order.

FACTS

The Underlying Disciplinary Proceedings

Plaintiff is a public high school football coach and teacher employed by the Capistrano Unified School District (District). In 2008, he was hired to be the head football coach at Dana Hills High School (DHHS). As head football coach, plaintiff worked with the Booster Club, a non-profit organization that provided organizational and financial support to the DHHS football program. He also was responsible for ordering equipment for the football team, which the Booster Club had to approve because it paid for the equipment.

Other coaches recommended plaintiff purchase equipment from Bill Lapes who owned Lapes Athletic Team Sales (LATS), a sporting goods vendor. Plaintiff conferred with the Booster Club's president who agreed with using LATS. When

plaintiff told Lapes he needed to purchase “spirit packs” for the football team, Lapes suggested the players’ parents purchase them directly from LATS.¹ Lapes also recommended plaintiff add an additional \$50 margin to the purchase price for each spirit pack. He indicated this margin was necessary to cover the cost of spirit packs for underprivileged players. He also explained the margin was necessary because some orders would go unclaimed and other items would be returned. Finally, he noted any money remaining from the increased price would be placed into a special account created for the school and could be used to purchase additional items for the football program. Lapes and other coaches had used this margin process for many years.

Plaintiff thought a \$50 margin seemed excessive but told Lapes he would think about the margin amount. He then placed several orders from LATS for the spirit packs. Excess money from those orders was credited into the special account for DHHS. At some point, plaintiff also placed some orders for football clothing and items for use by plaintiff and the coaching staff, which were paid from DHHS’ special account.

Around this time, plaintiff conferred with the Booster Club’s president and relayed Lapes’ explanation for the margin. However, plaintiff did not mention that part of the remaining credit in the school’s special account could be used to buy additional items from LATS. The Booster Club’s president believed the margin process was reasonable but asked plaintiff to request a lower margin. Plaintiff eventually contacted Lapes and advised him of the lower margin amount agreed to by the Booster Club. The final margin amount is not clear from the record.

Around the same time, LATS experienced financial problems, and Lapes turned over ownership of the business to two investors, Teresa Sando and her husband. The Sandos took LATS into liquidation. As a result, Lapes informed plaintiff that LATS

¹ “Spirit packs” refer to a package of items football players needed for spring and summer practice and the upcoming season, such as sweatshirts, t-shirts, shorts, and jerseys.

could not fulfill the spirit pack orders plaintiff had placed but recommended plaintiff contact his two sons who were forming their own business. Plaintiff contacted Lapes' son and placed the same orders at the same price. The players' parents ultimately purchased the spirit packs directly from the company owned by Lapes' son.

In 2010, Teresa Sando reported to the District that plaintiff and other coaches had engaged in a scheme with Lapes to defraud the District. She claimed Lapes used the margin process and supplied money and goods to coaches in exchange for the purchase of goods from LATS.

The District retained Attorney Defendants to investigate Sando's allegations, and Attorney Defendants hired an investigator to assist with the investigation. The investigator interviewed a few individuals but did not interview anyone from the Booster Club, the principal or athletic director of DHHS, or Lapes' sons. The investigator prepared a report primarily relying on Sando's version of events and concluded plaintiff had engaged in bribes and kickbacks, violated the District's open bidding requirements, and engaged in a conspiracy to defraud the District.

With Attorney Defendants' assistance, the District served plaintiff with charges and a notice of intent to dismiss, notifying him his employment would terminate in 30 days unless he demanded a hearing. After plaintiff requested a hearing, the District filed an accusation alleging there was cause to terminate plaintiff's employment. The District's operative second amended accusation alleged plaintiff's "immoral conduct, evident unfitness for service, and persistent violation of or refusal to obey the school laws of the state and District rules [was] evidenced by [plaintiff] giving and accepting bribes, circumventing the District's open bidding requirements, and engaging in a conspiracy to defraud the District." According to the second amended accusation, plaintiff had engaged in bribery, fraud, and kickbacks based on the credits made to the school account for the DHHS football program and plaintiff's purchases paid from the account. The second amended accusation claimed this conduct also violated California criminal laws.

The District accordingly sought plaintiff's immediate suspension and dismissal as an employee due to his transactions with Lapes and LATs.

The administrative law judge (ALJ) issued a decision dismissing the second amended accusation and reversing plaintiff's dismissal from employment. The ALJ found: "[Plaintiff] did not steal District funds or conspire with Bill Lapes to steal District funds. He did not misappropriate or embezzle any District monies or accept bribes or kickbacks to continue ordering from LATs. [Plaintiff] did not purchase any goods or items for his personal benefit. Rather, the items ordered on a few occasions from the special [school] account were used only for football program equipment and activities. The evidence indicates it is not unusual for high school coaches' apparel to be funded by booster or support groups, as opposed to out-of-pocket expenses by the coaches themselves. [Plaintiff's] conduct did not connote any immoral intent to benefit himself or to harm the District, DHHS, or its students." The ALJ also noted plaintiff violated the District's governing board's code of ethics by failing to disclose the full parameters of the margin process to the Booster Club and players' parents. However, the ALJ held: "[I]t was not established that [plaintiff's] violation of that policy was knowing, intentional or persistent. It was not established that [plaintiff] violated any other Board policies or District regulations, and it is not even clear that he knew the Board's Code of Ethics existed."

The District filed a petition for writ of mandate challenging the ALJ's decision and subsequently dismissed the petition with prejudice in September 2015. In February 2016, the parties entered into a general release, which identifies plaintiff's attorneys but not the District's attorneys. Paragraph 3(a) of the general release provides: "[Plaintiff] hereby fully and forever completely releases, acquits and discharges [the District] from any and all claims, costs, demands, damages, attorneys' fees, and rights which arise from, or are directly or indirectly related to, or are connected with, or caused by, the CLAIMS." The general release states it "is given by [plaintiff] and his agents,

attorneys, servants, employees, representatives, and successors in interest . . . concerning any and all actual, potential, known or unknown claims [plaintiff] has or may have against [the District], including, but not limited to circumstances related to In the Matter of the Immediate Suspension and Dismissal of Brent Melbon . . .” The District is defined as the District and “its present and former agents, officers, trustees, employees, representatives, predecessors, successors in interest, [and] assignees . . .” In another provision, the general release states: “[Plaintiff] agrees to hold [the District] harmless and to indemnify [the District] for and against any claim made by [plaintiff], his agents, attorneys, servants, employees, representatives, and successors in interest against [the District] which may have arisen or may arise from the CLAIMS.”

The Anti-SLAPP Motion

After Plaintiff initiated the instant malicious prosecution action, Attorney Defendants filed an anti-SLAPP motion. Relying on the general release, Attorney Defendants argued plaintiff could not demonstrate a minimal prospect of prevailing on the merits because plaintiff released all claims against Attorney Defendants. Regardless of the general release, they claimed plaintiff could not meet his burden on all three elements of a malicious prosecution claim.

Plaintiff filed an opposition with several declarations in support of his position. Plaintiff’s counsel submitted a declaration stating: “Having produced no evidence of fraud, bribery or anything remotely criminal in nature, I asked [one of the Attorney Defendants] in the [administrative] dismissal hearing to dismiss these allegations against [plaintiff]. [One of the Attorney Defendants] openly acknowledged to me that he had no evidence relating to fraud or bribery, but flatly refused to dismiss these baseless allegations.” Plaintiff also submitted a declaration stating: “[Attorney Defendants] asked the court for a continuance to develop more evidence The court granted the continuance to June 2014. Direct[ly] after that continuance, [Attorney

Defendants] convinced the [District] school board to put me on unpaid leave, without any new evidence or any new charges [Attorney Defendants] then told my attorney that they would dismiss the charges against me if I accepted a six-month severance package, admit liability, and agree to a full termination as a tenured teacher.”

The court denied the anti-SLAPP motion. First, the court held the malicious prosecution claim arose from protected activity. Second, the court found the general release did not release Attorney Defendants from plaintiff’s malicious prosecution claim. The court explained: “Ordinarily, a release that extends to a party’s ‘representatives’ would be understood to extend to its attorneys, inasmuch as attorneys are clearly a representative of the party. But the General Release must be read in its entirety, with all its provisions read in the context of the whole. And in two other provisions, the General Release refers to ‘attorneys’ *separately from* ‘representatives.’ The very first sentence of the General Release states, ‘This General Release is given by [plaintiff] and his agents, *attorneys*, servants, employees, *representatives*, and successors in interest’ [Citation.] Likewise, Paragraph 3(c) provides that ‘[plaintiff] agrees to hold [the District] harmless and to indemnify [the District] for and against any claim made by [plaintiff], his agents, *attorneys*, servants, employees, *representatives*, and successors in interest against [the District] which may have arisen or may arise from the CLAIMS.’” The court further found “the evidence provided by [p]laintiff explaining the context in which the settlement and release were negotiated further supports the conclusion that [p]laintiff’s claims . . . were not released.”

Finally, the court held plaintiff demonstrated a probability of prevailing on his malicious prosecution claim. According to the court, the disciplinary action terminated in plaintiff’s favor because the ALJ found the District failed to prove any of its accusations against plaintiff. The court found the ALJ’s findings became final when the District voluntarily dismissed its writ of mandate proceeding.

The court also found Attorney Defendants brought the disciplinary action without probable cause and explained: “Plaintiff’s evidence shows . . . that [Attorney] Defendants hired [an investigator] to investigate the charges against [p]laintiff; that Defendants’ investigator conducted a scant investigation, ignoring exculpatory evidence and failing to interview not only [plaintiff] but several other key witnesses with knowledge of facts that would exonerate [plaintiff]; and that Defendants were aware of the lack of support for the bribery/fraud/conspiracy accusations. [Plaintiff’s] counsel . . . testified in his declaration that one of the Defendants admitted to him during a break in the administrative hearing that the Attorney Defendants had no evidence of fraud or bribery, but that Defendants nevertheless refused to dismiss those accusations. He also testified that the Attorney Defendants demanded financial restitution from [plaintiff], despite having no evidence to support fraud, bribery and conspiracy accusations.”

The court relied on the same evidence in finding Attorney Defendants maintained the disciplinary action with malice and also pointed to “Defendants’ conduct during one of the continuances of the administrative trial, when the District took advantage of the delay to suspend [p]laintiff *without* pay and Defendants then attempted to take advantage of [p]laintiff’s resulting financial distress to pressure [p]laintiff to accept a settlement whereby he would admit liability for the charges Defendants knew to be baseless”

DISCUSSION

Attorney Defendants contend the court erred by denying their anti-SLAPP motion. Relying on the general release, Attorney Defendants argue plaintiff cannot show a probability of prevailing on the merits because he released all claims against the District’s representatives and agents, which included Attorney Defendants. They also

claim plaintiff cannot establish a probability of prevailing on his malicious prosecution claim. First, Attorney Defendants argue the disciplinary action did not terminate in plaintiff's favor because the ALJ did not find plaintiff was innocent and the parties settled the underlying action. Second, Attorney Defendants contend they had probable cause to file the disciplinary action because another coach accused of similar conduct resigned from his position while another coach was terminated in a different disciplinary action. They also suggest they had probable cause because plaintiff violated the District's code of ethics. Third, Attorney Defendants claim there was no malice because they hired an investigator before commencing the action, the ALJ determined plaintiff's conduct merited discipline, and the District's Board agreed plaintiff should be disciplined. For the reasons below, we disagree and find plaintiff established his malicious prosecution claim has minimal merit.²

Applicable Law and Standard of Review

“In evaluating an anti-SLAPP motion, the court conducts a potentially two-step inquiry. [Citation.] First, the court must decide whether the defendant has made a threshold showing that the plaintiff's claim *arises from* protected activity. [Citation.] To meet its burden under the first prong of the anti-SLAPP test, the defendant must

² We also deny Attorney Defendants' motion to strike portions of plaintiff's brief. They contend plaintiff's brief omits record citations, but we construe those portions of the introduction section as merely providing context for plaintiff's arguments. Attorney Defendants also claim plaintiff's brief misrepresents the facts by suggesting Attorney Defendants “criminally prosecuted” plaintiff. While plaintiff's brief exaggerates the criminal nature of the disciplinary action, the second amended accusation accused plaintiff of engaging in a “criminal conspiracy.” The second amended accusation also alleged violations of Penal Code sections 424, subdivision (a) and 641.3. Finally, Attorney Defendants contend plaintiff “ignores that [the District's] board, not [Attorney Defendants], filed the disciplinary charges against [plaintiff.]” Because Attorney Defendants represented the District in the disciplinary action, we are not persuaded by this argument.

demonstrate that its act underlying the plaintiff's claim fits one of the categories spelled out in subdivision (e) of the anti-SLAPP statute.” (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 859, review granted Nov. 1, 2017, S244148.) “Second—if the defendant meets its burden of showing all or part of its activity was protected—then the court proceeds to the next step of the inquiry. At this stage—applying the second prong of the anti-SLAPP test—the court asks ‘whether the plaintiff has demonstrated a probability of prevailing on the claim.’” (*Id.* at pp. 859-860.) Our Supreme Court has “described this second step as a ‘summary-judgment-like procedure.’ [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] ‘[C]laims with the requisite minimal merit may proceed.’” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385, fn. omitted.)

Here, we are concerned only with the second prong. The court found the malicious prosecution action arose out of protected activity, and the parties do not challenge this finding on appeal. Accordingly, we must determine if plaintiff proffered evidence giving rise to a probability of prevailing on his malicious prosecution action. We review the court's ruling de novo, applying the legal principles discussed above. (*Bonni v. St. Joseph Health System, supra*, 13 Cal.App.5th at p. 860, review granted Nov. 1, 2017, S244148.)

The General Release Did Not Release Claims Against Attorney Defendants

Attorney Defendants contend plaintiff cannot prevail on his malicious prosecution claim because he released all claims against Attorney Defendants by entering into the general release. For the reasons below, we disagree.

“The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.)

“California recognizes the objective theory of contracts [citation], under which ‘[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation’ [citation]. The parties’ undisclosed intent or understanding is irrelevant to contract interpretation.” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, *supra*, 109 Cal.App.4th at p. 956.) Each part of the contract must be interpreted with reference to the entire agreement. (Civ. Code, § 1641.)³ “Construction cannot lead to unfair or absurd results but must be reasonable and fair.” (*California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 143.) In construing a contract, the court also looks to “the circumstances under which it was made, and the matter to which it relates.” (§ 1647.)

Applying the above principles, we conclude the court correctly held the general release did not use the terms “representatives” or “agents” to encompass Attorney Defendants. While we agree a party’s “representatives” and “agents” typically include its attorneys, the general release must be read in context. Paragraph 3(a) of the general release provides: “[Plaintiff] hereby fully and forever completely releases, acquits and discharges [the District] from any and all claims, costs, demands, damages, attorneys’ fees, and rights which arise from, or are directly or indirectly related to, or are connected with, or caused by, the CLAIMS.” The District is defined as “Capistrano Unified School

³

All statutory references are to the Civil Code unless otherwise stated.

District and its present and former agents, officers, trustees, employees, representatives, predecessors, successors in interest, [and] assignees” The general release does not identify the District’s *attorneys* separately from its *representatives* and *agents*. However, when referencing plaintiff, the general release separately identifies plaintiff’s attorneys: “[Plaintiff] and his agents, *attorneys*, servants, employees, representatives, and successors in interest” In another provision, the general release again refers to attorneys separately from representatives and agents: “[Plaintiff] agrees to hold [the District] harmless and to indemnify [the District] for and against any claim made by [plaintiff], his agents, *attorneys*, servants, employees, representatives, and successors in interest against [the District] which may have arisen or may arise from the CLAIMS.”

Defendant claims the provisions that reference “attorneys” are irrelevant because those “clauses are essentially independent.” We disagree because “[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (§ 1641.) If the parties wanted to release the District’s attorneys, they could have spelled this out as they did in other provisions. Because they did not, we conclude plaintiff did not release his malicious prosecution claim against Attorney Defendants.

Plaintiff Has Demonstrated a Probability of Prevailing on His Malicious Prosecution Cause of Action

“To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) We examine each element below.

Plaintiff Established a Prima Facie Showing that the Underlying Action Was Terminated in His Favor

“The first element of a malicious prosecution cause of action is that the underlying case must have been terminated in favor of the malicious prosecution plaintiff. The basis of the favorable termination element is that the resolution of the underlying case must have tended to indicate the malicious prosecution plaintiff’s innocence. [Citations.] When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff’s innocence of the misconduct alleged in the underlying lawsuit.” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 217 (*Daniels*).)

Here, plaintiff has met his burden of showing the disciplinary action was terminated in his favor. The ALJ dismissed the second amended accusation and reversed plaintiff’s suspension without pay and dismissal from employment. The ALJ also held the District failed to prove any of its accusations against plaintiff.

Attorney Defendants contend the ALJ did not find plaintiff was innocent because the ALJ’s decision “found [plaintiff] guilty of violating the District’s rules of ethics, using poor judgment and referred to his conduct as unprofessional and unsatisfactory.” However, the ALJ explained: “[I]t was not established that [plaintiff’s] violation of [the District’s code of ethics] was knowing, intentional or persistent. It was not established that [plaintiff] violated any other Board policies or District regulations, and it is not even clear that he knew the Board’s Code of Ethics existed.” Based on these findings, we are not persuaded by Attorney Defendants’ argument that the ALJ’s decision failed to reflect plaintiff’s innocence. We also reject Attorney Defendants’ attempt to relitigate the ALJ’s findings, which they claim were incorrect. We are not in a position to entertain a claim contesting the ALJ’s decision.

Attorney Defendants also contend the ALJ's decision was not final because they appealed and the case eventually settled. They argue "[t]ermination through settlement is not a favorable termination." However, the ALJ's decision was final once the District voluntarily dismissed its writ of mandate proceeding. There is nothing in the record to suggest the proceeding was dismissed as a result of the parties' settlement. As the court noted, "The General Release does not mention the [w]rit of [m]andate proceeding, and the record . . . indicates the [w]rit of [m]andate proceeding was dismissed . . . months *before* the General Release was executed in February 2016."

In their reply, Attorney Defendants further argue they did not "commence" the disciplinary action. They claim the notice of disciplinary charges did not mention Attorney Defendants, the District served the charges, and the District's board amended the charges. Attorney Defendants forfeited this argument by failing to raise it until their reply brief. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214 ["[W]e need not consider new issues raised for the first time in a reply brief in the absence of good cause"].) Regardless of the forfeiture, the contentions lack merit because it is undisputed Attorney Defendants prosecuted the disciplinary action on the District's behalf.

Plaintiff Established a Prima Facie Showing that Attorney Defendants Continued to Prosecute the Underlying Action Without Probable Cause

Plaintiff claims Attorney Defendants had an insufficient factual basis to support their allegations in the disciplinary action, did not conduct an adequate investigation, and ignored key evidence. "“[P]robable cause is lacking ‘when a prospective plaintiff and counsel do not have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial.’” [Citations.] “In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.”” (*Daniels, supra*, 182 Cal.App.4th at pp. 222-223.) “Where there is no dispute as to the facts upon which an attorney acted

in filing the prior action, the question of whether there was probable cause to institute that action is purely legal.’ [Citation.] ‘The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted.’” (*Id.* at p. 222.)

Plaintiff has sufficiently raised a factual dispute as to whether Attorney Defendants objectively had probable cause to commence and continue to prosecute the disciplinary action. Plaintiff’s evidence shows Attorney Defendants relied on an investigator who did not interview key witnesses who could have exonerated plaintiff. In particular, the investigator did not interview the DHHS principal or athletic director, or anyone from the Booster Club. Instead, the investigator primarily relied on Sando’s version of events. No reasonable attorney would have thought the allegations of fraud, bribery, and kickbacks were legally tenable based on Sando’s speculation.

Even if Attorney Defendants had probable cause to commence the action, there is evidence they continued to prosecute the action after discovering a lack of probable cause. For example, plaintiff points to his attorney’s declaration, which states, “During the administrative hearing in about March and April of 2015 [one of the Attorney Defendants] openly acknowledged to me that he had no evidence relating to fraud or bribery, but flatly refused to dismiss [the] baseless allegations.” Viewing the evidence in the light most favorable to plaintiff, as we are required to do at this stage of the proceeding, the evidence supports an inference Attorney Defendants knew they lacked probable cause to continue to prosecute the action. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [continuing to prosecute a claim after discovering there is no probable cause may support a malicious prosecution action].)⁴

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Attorney Defendants correctly contend we should only consider admissible evidence. In the trial court proceedings, Attorney Defendants objected to their statement that there was no evidence of fraud or bribery as irrelevant and inadmissible hearsay. Nonsense. The statement was highly relevant to both the probable cause and malice elements of the malicious prosecution claim and is clearly admissible under the state of

Attorney Defendants maintain probable cause existed to file the underlying action. First, they note a coach accused of similar conduct resigned from his position while another coach was terminated in a different disciplinary action. Probable cause regarding two other coaches has no bearing on whether Attorney Defendants had probable cause to maintain an action against *plaintiff*.

Second, Attorney Defendants contend the ALJ made certain incorrect findings and ignored key evidence. This says nothing about whether Attorney Defendants had probable cause to commence or maintain the disciplinary action against plaintiff. We also reject Attorney Defendants' attempt to relitigate those findings because we are not in a position to entertain a claim contesting the ALJ's decision.

Finally, Attorney Defendants contend they had probable cause "based upon the ALJ's decision indicating that [plaintiff] acted unethically and unprofessionally" The ALJ found plaintiff technically violated the District's code of ethics "by failing to disclose to . . . the Booster Club the fact that a margin to be built into the . . . football spirit packs would include a credit he could use to make purchases on behalf of the football program." However, the ALJ also held "it was not established that [plaintiff's] violation of that policy was knowing, intentional or persistent. It was not established that [plaintiff] violated any other Board policies or District regulations, and it is not even clear that he knew the Board's Code of Ethics existed." These findings do not suggest Attorney Defendants had probable cause to continue prosecuting their allegations of fraud, bribery, and kickbacks after they learned there was no evidence of fraud or bribery.

mind and party admission exceptions to the hearsay rule. (Evid. Code, §§ 1220 & 1250, subd. (a)(1).)

Plaintiff Established a Prima Facie Showing that Attorney Defendants Acted with Malice

“‘[T]he “malice” element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of . . . the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive.’ Improper purposes can be established in cases in which, for instance: (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim. [Citation.] If the prior action was not objectively tenable, the extent of a defendant’s attorney’s investigation and research may be relevant to the further question of whether or not the attorney acted with malice.” (*Daniels, supra*, 182 Cal.App.4th at pp. 224-225.)

“[M]alice [also] can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause. (*Id.* at p. 226.) Because “‘parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.’” (*Id.* at p. 225.)

In determining if malice exists, we keep in mind that on review of an anti-SLAPP motion, we must accept as true the evidence favorable to the plaintiff and that a “‘plaintiff needs to show only a case of “minimal merit.”’” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 348.) We draw all reasonable inferences from the evidence in favor of the plaintiff. (*Tushscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1238-1239.)

Plaintiff relies on several pieces of evidence to establish malice, including the lack of merit in the allegations made in the disciplinary action. Although a lack of probable cause, on its own, does not support a finding of malice, here there is more. (*Daniels, supra*, 182 Cal.App.4th at p. 225.) As noted above, plaintiff's counsel submitted a declaration stating one of the Attorney Defendants admitted they had no evidence of fraud or bribery but refused to dismiss the action. Although Attorney Defendants claim the lacking evidence of fraud or bribery is irrelevant because they had evidence plaintiff violated the District's code of ethics, we must view the evidence in the light most favorable to plaintiff. Applying this standard, the evidence supports an inference Attorney Defendants continued to prosecute the action with knowledge it lacked probable cause. (*Id.* at p. 226 [““Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset””].) Plaintiff's declaration also states Attorney Defendants asked for a continuance to develop evidence for their case but later told plaintiff's attorney they would dismiss the case only if plaintiff admitted liability, accepted full termination, and agreed to a six-month severance package. This is another piece of evidence from which an inference of malice can be made. Instead of dismissing the case, Attorney Defendants pushed to settle claims they arguably knew were unmeritorious.⁵

Attorney Defendants counter the above evidence by pointing to the disciplinary actions commenced against two other coaches. Given those actions, they claim they did not specifically target plaintiff. They also contend there is no malice

⁵ In the trial court proceedings, Attorney Defendants objected to their statement about dismissing the case, claiming it was excludable as an offer to compromise under Evidence Code section 1152. We disagree because the statement was not offered to prove either party's liability. Rather, the statement was offered to establish Attorney Defendants' state of mind and whether they had probable cause to maintain the action.

because they relied on an investigation firm, the ALJ determined plaintiff's conduct merited discipline, and the District's board agreed plaintiff should be disciplined. Regardless of whether Attorney Defendants targeted plaintiff at the outset or others agreed to commence the action, there is evidence Attorney Defendants continued to prosecute the disciplinary action after becoming aware the action lacked probable cause. As noted above, the ALJ's decision also did not suggest Attorney Defendants were justified in continuing to prosecute their allegations of fraud, bribery, and kickbacks after they learned there was no evidence of fraud or bribery. Viewing the evidence in the light most favorable to plaintiff, Attorney Defendants' evidence and arguments do not establish as a matter of law that plaintiff cannot prevail. Accepting all admissible evidence as true and indulging every reasonable inference in plaintiff's favor, the court properly found plaintiff satisfied the minimal merit showing on the element of malice.

Finally, Attorney Defendants argue plaintiff has provided no evidence of malice regarding Jeanne Blumenfeld, an associate at Attorney Defendants' law firm. We agree with the court that this argument "is not supported by Blumenfeld's own Declaration, in which she describe[d] her role as being 'one of the attorneys . . . representing the [District] . . . in the Accusation against [plaintiff]' and acknowledge[d] that '[o]ur office prepared Charges against' [plaintiff]." As the court noted, "Blumenfeld [did] not try to distance herself from involvement in the case or suggest that, as an associate, she cannot be held liable for a malicious prosecution action because, in effect, she was just taking orders or direction from a more senior attorney at the firm."

DISPOSITION

The order denying Attorney Defendants' anti-SLAPP motion is affirmed.
Plaintiff shall recover his costs incurred on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.